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No. A-899

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GRACE KIM AND JASON KIM, PETITIONERS

VS.

DONALD TAYLOR AND SUSAN TAYLOR, RESPONDENTS

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES
FROM THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether there is a denial of Due Process of Law where: (a) petitioners seek appropriate and adequate injunctive relief against racial prejudice, harassment, and assault, (b) petitioners thereafter waive their right to a trial with respect to such orders in reliance upon a clear stipulation allowing entry of such orders as petitioners may deem necessary and appropriate, (c) the stipulation is thereafter not given effect, and, in consequence, (d) petitioners are without adequate and suitable protection and are instead subject to orders that are both underinclusive and overinclusive with respect to their situation.

PARTIES

[The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.]

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STATEMENT OF GROUNDS

ON WHICH JURISDICTION INVOKED

(i) The judgment of the Superior Court of California, County of San Bernardino is sought to be reviewed Said judgment was rendered on July 11, 1980, and entered on July 14, 1980.

(ii) The opinion of the Court of Appeal, Fourth District, Division Two, State of California was filed on December 7, 1981.

The denial of the petition for rehearing was filed on December 28, 1981 by the Court of Appeal, Fourth District, Division Two, State of California.

The denial of the petition for hearing was filed on February 3, 1982 by the Supreme Court of the State of California.

On April 23, 1982, the Hon. William H. Rehnquist, Associate Justice of the Supreme Court of the United States granted the application of counsel for petitioners for an extension of time for filing a

petition for writ of certiorari, the time for filing being extended to and including June 7, 1982.

(iii) (Not applicable)

(iv) The Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

This case involves section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part, "No State shall ... deprive any person of life, liberty, or property, without due process of law...."

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STATEMENT OF THE CASE

The petitioners, Jason Kim and Grace Kim, brought an action in the California Superior Court seeking, inter alia, preliminary and permanent injunctive orders. The Kims sought protection and peace from alleged repeated hostile actions perpetrated by their adjoining neighbors, who are the respondents herein, Donald Taylor and Susan Taylor: racial epithets, trespass, property damage, threats, assault and battery. During the pendency of the action, which was aggressively litigated over five years, evidence was amassed, photographic, documentary and testimonial, that would evince the egregiousness of the Taylors' actions over the many years. Such evidence would, the Kims anticipated, demonstrate the necessity for a comprehensive panoply of protections adequate to preclude repetition of respondents' conduct, and to protect the Kims from future harm.

During trial, counsel for respondents offered to stipulate to the entry of "permanent mutual restraining orders against all parties." One can surmise that respondents sought to: (1) avoid disclosure, upon the public record, of the explicit evidentiary material about to be introduced; and (2) reduce the possibility that the trier would find that an alleged severe battery had in fact occurred, in light of the specific evidence of other wrongdoing introduced. Petitioners' counsel rejected the proposal, expressing concern that respondents would reject particular provisions subsequently proffered by petitioners. Petitioners' counsel, rejecting such joint responsibility for draftsmanship, proposed instead that the lodestar governing the injunction be, quite simply, <u>whatever the petitioners would deem necessary</u>, provided only the provisions be mutual. The respondents agreed to

this procedure. (The colloquy to this effect is reported in the partial transcript set forth in the Appendix hereto at page A30 et seq.)

The trial then proceeded to conclusion in respect of certain ancillary issues, not relevant to this petition. Following trial, petitioners presented to the court, for inclusion within the Judgment, the injunctive orders they deemed necessary to afford them adequate and appropriate protection. (See page A34 et seq. of the Appendix hereto.) The court, however, to the petitioners' astonishment, rejected the proffered formulation, choosing instead to adopt a de novo approach to the issue of what injunctive provisions appeared to be adequate to the neighbors' circumstances. In consequence, the petitioners now find themselves restricted to, and restricted by, a permanent injunctive mechanism to which they did not stipulate, and as to

which they were deprived a trial on the merits. (See page A26 et seq. of the Appendix hereto.) The petitioners submit that the aforesaid conduct by the California trial court, and the sustaining thereof by the California appellate courts, is so totally devoid of support as to render it unconstitutional under the Due Process Clause of the Fourteenth Amendment.

MANNER IN WHICH FEDERAL QUESTION WAS RAISED

The Federal question involved in this case is whether petitioners were denied Due Process of Law, as guaranteed by the Fourteenth Amendment to the United States Constitution, by reason of being deprived of a trial on the merits in reliance upon a purported stipulation, which stipulation was in fact an imposture. This argument was asserted at four different junctures:

First, the argument was timely asserted during a post-trial, prejudgment chambers conference with the trial court judge, held for the purpose of attempting to enforce the stipulation.

Second, the argument was reasserted in petitioners' brief on appeal tp the California Court of Appeal, Fourth District, Division Two. Third, the argument was reasserted in the Petition for Rehearing to the Court of Appeal. Fourth, the argument was reasserted in the Petition for Hearing filed in the Supreme Court of the State of California.

It is well-settled that in framing a federal question, no particular form of words or phrases is required "if the record as a whole shows either expressly or by clear intendment that this was done...." N.Y. Ex Rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928). "[I]t is not necessary that the question should appear on the record to have been raised,

and the decision made in direct and positive terms, ipsissimis verbis...." St. Louis I. M. & S. R. Co. v. Starbird, 243 U.S. 592, 598-99 (1917). Thus, in Braniff Airways v. Nebraska State Board, 347 U.S. 590, 598 (1953), the Due Process Clause was deemed invoked notwithstanding the failure of petitioner to mention it. What the petitioner therein did do below was to present the pertinent facts and contentions, and the Supreme Court held that, "[t]hough inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented." 347 U.S. at 599.

Apart from this latitude that may be accorded a petitioner's presentation of a federal question, or the nexus of facts implicitly providing such presentation, it is further recognized that a party is not barred by failure to cite constitutional provisions when it is

clear that the lower courts have considered the relevant provisions. See, e.g., Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 217 fn. 3 (1968).

In the instant case it is manifest that petitioners presented, and the California courts considered, a Due Process contention. As in Braniff Airways, supra, the petitioners may not have intoned the particular phrase, but, as in Braniff, they asserted contentions, the resolution of which fell within the purview of the Fourteenth Amendment Due Process Clause.

The Opinion of the Court of Appeal (see Appendix) makes it plain petitioners alleged they had waived trial, in reliance upon a stipulation, and if the stipulation is not given effect, the petitioners have lost their day in court. As indicated in United States v. Armour & Co., infra, the foregoing constitutes

a violation of Due Process as guaranteed by the Fourteenth Amendment. Thus, petitioners' argument below, although inexplicit, invoked federal guarantees of Due Process.

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REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DEPRIVED PETITIONERS OF THEIR RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT

Petitioners, over the course of a five-year, emotionally and financially consuming litigation, attempted to secure injunctive protections against racially-motivated harassment and assault perpetrated by the adjoining homeowners. The relief sought was resisted by respondents, up to the moment petitioners were about to introduce their evidence of respondents' conduct. Respondents then stipulated to accept such mutual restraining orders as petitioners alone would subsequently formulate (the "stipulation"). The substantial advantages secured by respondents in exchange for the stipulation were discussed in the Statement of the Case. As described hereinabove, the

trial court thereafter rejected petitioners' formulation, and proceeded to adopt a de novo approach to the issue of what injunctive protections were appropriate to the parties' situation. This erroneous procedure was followed notwithstanding the clear, bargained-for stipulation that empowered petitioners alone to be the arbiters of the scope of protection appropriate and necessary. Further, inasmuch as entry into the stipulation precluded the introduction of evidence as to previous acts of respondents' misconduct, the trial court was without guidance as to what might comprise suitable orders.

Where, as here, parties have waived their right to litigate the issues raised, they have raised a right guaranteed to them by the Due Process Clause of the Fourteenth Amendment. Where such a waiver is in reliance upon a bargained-for stipulation, the stipulation must be

respected, and construed as written, and the court's failure to give such effect to the stipulation will constitute a denial of Due Process.

A similar situation is illustrated in United States v. Armour & Co., 402 U.S. 673 (1971). The parties therein had earlier agreed to an antitrust consent decree, and thereby had waived a trial on the merits. The government then sought to modify said decree, which was clear on its face, under the guise of interpreting the consent decree and applying the decree to the purpose it was intended to serve. In rejecting this attempt, the Court stated:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost

> and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation. 402 U.S. at 681-682.

The Kims have likewise been deprived of Due Process of Law as guaranteed by the Fourteenth Amendment. The Kims invested, financially and emotionally, in five years of pretrial pleading,

discovery, law and motion, all in preparation for a trial they were never accorded. The Kims have been deprived of their liberty without Due Process of Law, as they now find themselves subject to permanent restraining orders that are both underinclusive and overinclusive in nature.

The underinclusive character of the insufficient injunctive orders constitutes a deprivation of the Kims' liberty to the quiet and safe enjoyment of their home and their privacy. At the same time, the injunctive orders are in several respects overinclusive, and Jason Kim finds himself the subject of restraining orders in a manner never intended, not the product of either stipulation or trial, and having no basis in fact.

The deprivation of Due Process of Law that occurred below, and the resulting deprivation of liberty, are in manifest violation of the Due Process Clause

of the Fourteenth Amendment to the United States Constitution.

2. THIS COURT SHOULD GRANT REVIEW PURSUANT TO ITS SUPERVISORY POWER TO CORRECT A GROSS MISCARRIAGE OF JUSTICE

It is respectfully submitted that the Court consider this case among the limited number wherein review is appropriate notwithstanding the absence of conflicting decisions, novel principles of law, or great public interest. Where the result below is unjust, plainly erroneous, and in particular, encompasses the deprivation of the litigants' right to a trial, certiorari jurisdiction should be exercised. See, e.g., Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 510 (1957); Thompson v. City of Louisville, 362 U.S. 199,202 (1960); Washington v. U.S., 357 U.S. 348 (1958).

Where the court below has, as here,

so arrantly departed from the accepted course of judicial proceedings, the need for the Supreme Court to exercise its ultimate responsibility for the proper functioning of the judiciary is heightened. The clear error committed by the trial court below was equaled by the indifference, approaching sarcasm, exhibited by the appellate court. For example, the petitioners' proffered injunctive order included a provision restraining the Taylors from engaging in any of the proscribed conduct against, not merely the petitioners, but also, family, friends, relatives, and the like. The court of appeal's response was to liken this sensible provision to one proscribing "eating fish on Tuesdays or swimming during the month of July," observing that the stipulation did not include such giving of "free reign to the imagination."

Grace and Jason Kim are naturalized citizens whose understanding of the American legal system was limited but who placed their faith in that system to protect them from racial prejudice, harassment and assault. After seven years of trial and appellate litigation, one must now explain to the Kims why their request that family and friends be able to visit them, in safety and without harassment, is caustically dismissed by the California Appellate Courts as comparable to a restraining order in respect of eating fish. It is respectfully submitted that the result below cannot be justified and is the proper subject of the exercise of this Court's jurisdiction.

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CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the California court.

Respectfully submitted,

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